SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 915

BARBARA JUNE MUNCY AND CHARLES MUNCY,
Petitioners,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Application of Petitioners

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CITATIONS TO OPINIONS BELOW

Pursuant to findings of a jury, the District Court entered judgment in favor of the Petitioners on April 10, 1964, without written opinion (Vol. II, R. 509). The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, *infra,* page A1, is at present unreported. The opinion of the Texas Court of Civil Appeals of Dallas on a venue question alone, printed in Appendix B hereto, *infra,* page A9, is reported in 357 S. W. 2d 430.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 6, 1966 (R. Vol. III, 1108, Appendix C. page A24, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals can re-examine the facts found by a jury so as to deny a trial by jury under the Seventh Amendment by (a) rejecting the testimony of Respondent's Co-defendant because it was given without objection in answer to a leading question, (b) denying a jury the privilege of choosing between logical inferences and contradictory testimony, and (c) substituting its own findings for those of a jury.

2. Whether the Court of Appeals can deprive the jury of the right of considering testimony elicited without objection by a leading question to Respondent's Co-defendant, despite F. R. C. P. 43(b) allowing the same, and thereby rendered judgment contrary to a jury verdict for reasons not urged in the Trial Court or Court of Appeals.

3. Whether the Court of Appeals can preclude a jury trial on factual issues by holding itself bound by enunciated principles of a Texas intermediate appellate court in an interlocutory venue proceeding, which principles turned on evidence not shown to be substantially the same and which, in fact, differed greatly from that adduced at the trial on the merits.

STATUTES INVOLVED

1. U. S. Constitution, Amendment VII.

2. Federal Rules of Civil Procedure, 38(a); 43(a), (b), printed in Appendix D, pages A25, *infra*.

STATEMENT

On July 27, 1962; the Petitioners filed a Complaint seeking damages by reason of the severance of the left leg of Barbara June Muncy and accompanying serious injuries caused by her being driven through a plate glass store front by a runaway automobile manufactured by the Respondent (Vol. I, R. 1). The jurisdiction of the District Court was invoked because of a complete diversity of citizenship between the plaintiffs and all defendants. In response to a charge that was unassailed on appeal, the jury to which the case was tried returned a verdict against General Motors Corporation, C. L. Lane and wife, owners of the automobile, and Mrs. Nellie Hudnall, who was in the vehicle when it crashed into Mrs. Muncy (Vol. II, R. 506). Only the Respondent, General Motors Corporation, appealed from the judgment for $225,000.00 (Vol. II, R. 507).

A panel of the United States Court of Appeals for the Fifth Circuit entered a judgment reversing that of the District Court (Vol. III, R. 1108, Appendix A and C, pages A1, A24, *infra*) for the reason that a verdict should have been directed for General Motors Corporation.

The runaway Chevrolet was bought new by the Lanes on August 27, 1960 (Vol. II, R. 640), and at the time of the injuries of Mrs. Muncy on September 16, 1960, had only been driven six or seven hundred miles (Vol. II, R. 627).

The automobile had not been driven in excess of forty or fifty miles per hour, and no occasion for floorboarding the accelerator had ever arisen (Vol. II, R. 627-628). The Defendant, Mrs. Lane, diagonally parked this automobile against an eight inch curb on Main Street in Kilgore, Texas, and alighted from it (Vol. II, R. 696). She was misled into thinking that she had turned the ignition off by reason of the design of the ignition switch, which permitted the withdrawal of the key with the motor running while the car is in gear (Vol. II, R. 630; R. 639-641, 643, 721). To quote Mrs. Lane, "I thought I had (turned the ignition off). I had the key in my hand." ((Vol. II, R. 630).

The Accelerator Linkage

As Mrs. Hudnall was attempting to slide out on the driver's side from her position on the passenger's side of the front seat (Vol. II, R. 628-629, 681), the car gave a violent lurch (Vol. II, R. 681, 688), with the motor wide open and sounding as though someone had depressed the accelerator (Vol. II, R. 606; 613-614; 617-618).

The Circuit Court of Appeals held that direct testimony of Defendant, Mrs. Hudnall,[1] that she did not have her foot

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1. Appendix A, pages A4-A5, A6-A7, *infra*. We quote other parts of the Record to put the question and answer quoted in the opinion in proper context, as follows:

"Q. You didn't freeze on the accelerator pedal or anything like that, did you?

A. I don't think so.

Q. You admit being thrown about in there while the car was moving, don't you?

A. As I said, I don't remember.

Q. Well, you do remember that you didn't have any conscious knowledge of getting on a pedal and holding it down?

A. If I did—

Q. Did you do that?

A. If I did, I don't know it.

Q. Well, you would know if you did that, wouldn't you, Mrs. Hudnall?

A. Well, under the circumstances, I don't know if I would know it or not.

holding the accelerator pedal down was incompetent, and that the jury verdict could not be sustained on an inference therefrom that the accelerator linkage was defective. The Court wholly overlooked[2] the physical facts showing that Mrs. Hudnall must have been thrown about in the car in a way that would have prevented her from holding the accelerator pedal down. She testified that the experience caused her to have general soreness "all over" and bruises on her left arm (Vol. II, R. 685). This may well have resulted from her being violently buffeted against the interior of the car when it jumped the curb, moved violently across the sidewalk and into the side of the building (Vol. II, R. 596). An eyewitness, with opportunity of observation furnished by reason of his moving into the car from the passenger's side in an effort to stop it (Vol. II, R. 599), testified that while the car was pushing against the building with wheels continually spinning, squealing and burning rubber (Vol. II, R. 597), Mrs. Hudnall was screaming with her feet straight down from her knees, and kicking without bending her knees so that her legs moved up and down perpendicular to the floor (Vol. II, R. 599-600). The

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Q. But as it is right now, your best recollection is you did not do that?

A. So far as I know, I did not.

Q. That was your best recollection of it?

A. Yes." (Vol. II, R. 685-686).

"* * * Q. And you know that you didn't freeze or stick your foot on the accelerator and hold it down?

A. I don't know the accelerator from the brakes.

Q. Then you know that you didn't have your foot on anything there holding it down, don't you?

A. I did not.

Q. Ma'am?

A. I did not." (Vol. II, R. 687-688).

2. The opinion reads: "The testimony of other witnesses shed no light upon whether or not Mrs. Hudnall kept her foot on the accelerator" (Appendix A, page A5, *infra*).

same witness testified that the motor on the automobile "was wide open" until someone reached in to the car from the opposite side and relieved the car of its forward motion by stopping the motor (Vol. II, R. 598-599).

At least seven days before the calamity, Mrs. Lane had difficulty with the accelerator and hand brake. The latter just stopped working and the former caused her to drive home from work riding her foot brake (Vol. II, R. 624-625). The Court of Appeals interpreted the testimony as showing that this difficulty resulted from the engine idling high. However, Mrs. Lane testified positively that the accelerator mechanism was stuck, and her husband "unstuck it" by "jiggling" something (Vol. II, R. 627). Additional evidence from which the jury could find that a defect in design or manufacture caused the accelerator to stick is found in the testimony that Chevrolets have come off of the assembly line with accelerator linkage that was stuck (Vol. II, R. 902-903). Further, the Respondent admitted by discovery interrogatories and answers and shop manual drawings that at the time of the runaway the Chevrolet was equipped with an accelerator linkage with ten binding points where metal bore on metal (Intys. 49-50, Vol. I, R. 51-52, Answered Vol. I, R. 108, 109, with Exhibit attached, Vol. I, R. 116, Plaintiffs' Exhibit 6). During the first trial, it attempted to substitute for the admission testimony the contention that a later linkage design with non-friction sleeves at some of the binding points was in use on the runaway automobile (Defendant's Exhibits 9 and 10, Vol. II, R. 948-949; 1004-1005; 943-944; 945-946). It was for the jury to say which design of accelerator linkage was actually on the automobile, and whether or not some of the binding points actually stuck.

The particular Chevrolet was manufactured June 3, 1960, and shipped the same date, f.o.b., St. Louis (Vol. II,

R. 897). During its peak period, the assembly line in St. Louis produced fifty or sixty cars an hour (Vol. II, R. 912).

The Ignition Switch

The Court of Appeals[3] concluded that the principle set forth by the Dallas Court of Civil Appeals,[4] following an interlocutory hearing on a venue question, pronounced the law of Texas so as to deprive the petitioners of a trial by jury on the merits. The venue issue depended on whether the "ADMISSIONS OF GENERAL MOTORS CORPORATION" as set out in the Dallas Court's opinion established causative negligence flowing from the design of the ignition switch. In holding these admissions did not, the Dallas Court added,

> *"In the absence of evidence to the contrary,* we shall not presume that General Motors Corporation designed the car for use in a manner violative of the law, or that it should have anticipated such illegal use as probable." (Appendix B, page A19, emphasis added).

The Dallas Court did not have before it the additional evidence adduced at the trial on the merits by way of interrogatories and answers of the Respondent and testimony from six engineer employees of the Respondent. This testimony showed a deliberate design of the ignition switch so as to permit removal of the key in the "ON" position with the motor running (Vol. II, R. 644). This single key switch was designed for and first employed on an automobile with a manual transmission that did not permit the leaving of the automobile unattended and in gear with the motor running (Vol. II, R. 720-722, 735-36, 796-97, 945). When an automatic transmission system was placed on its Chevrolet

3. Appendix A, page A1, *infra.*

4. Appendix B, page A9, *infra.*

automobiles by the Respondent, the single key switch in combination with it permitted the automobile to be left unattended with the motor running and in gear (Vol. II, R. 735-736, 722).

The Respondent recognized the danger of an automobile being so left by reason of the combination of the switch and the automatic transmission at the time of the change, but considered it remote and the risk of injury from it to be outweighed by convenience to the customer (Vol. II, R. 965-966). At the same time, the Respondent recognized the kindred danger of a car being inadvertently started in gear through the combination of the ignition switch and automatic transmission. In this situation, when a human agency would be in control of the mechanism and have at hand sufficient braking power to stop the unintended movement (Vol. II, R. 897), the Respondent anticipated the danger and provided against the risk it engendered by installing a safety switch that prevented the motor of the car from being started unless the controls were in "PARK" or "NEUTRAL" gear (Vol. II, R. 955-956).

Respondent had information that its cars with an ignition switch permitting removal of the key in "ON" position had been inadvertently or accidentally left unattended with the motor running (Vol. II, R. 648-649). It was the expert opinion of Professor Varner, in response to hypothetical questions based on factual factors in evidence, that the ignition system in question was improper for use on a car with an automatic transmission (Vol. II, R. 791-793, 794, 795, 796, 797, 802).

Finally, the Respondent had at its command feasible and economic means to avoid the danger of the combination of the single key ignition switch and automatic transmission without impairing the utility of the car. Such means

were used on all American made cars except the Chevrolet and Buick (Vol. II, R. 646-647, 648). In fact, removal of the key from the "accessory" position was prohibited by Respondent as a reminder to guard against leaving the car with the radio or other accessories on (Vol. II, R. 641-643); and other simple devices were used as reminders to guard against other things that would not expose the car to becoming a "derelict", menacing the public with death and grievous bodily injury (Inty. 45-47, Vol. I, R. 50-51, Vol. II, R. 650-651).

ARGUMENT

The Accelerator Linkage

The Circuit Court of Appeals for the Fifth Circuit reexamined the facts established by the verdict of the jury, and concluded that the testimony of a party defendant that she was not holding the accelerator pedal down on a runaway automobile as it ground the plaintiff through a plate glass window was of no probative effect; that since the jury may have concluded to the contrary, or that the pedal was stuck due to some external interference, and also might have been due to the negligence of General Motors Corporation, a showing was made that the accident may have resulted from one of several causes, and that the verdict was therefore based on speculation and conjecture and could not stand.

This opinion conflicts with the decisions of this Court, which have uniformly and zealously preserved the right of trial by jury, as guaranteed by the Seventh Amendment, in all cases that have come before it, as follows:

Barney v. *Schmeider*, 9 Wall. 248, 251, wherein the Court stated that under the Seventh Amendment to the Constitution no re-examination of the facts found by a jury

is permissible, except by granting a new trial in the same Court in which the evidence was rendered.

Atlantic & Gulf Stevedores v. *Ellerman Lines,* 369 U. S. 355, 360, 7 L. Ed. 2d 798, 804, a tort action over which Federal jurisdiction existed alone by reason of diversity of citizenship, and wherein the Court declared that neither it nor the Court of Appeals could redetermine the facts found by the jury any more than the District Court could predetermine them; since the Seventh Amendment says that no fact tried by jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. Further, that in cases where jurisdiction rests on diversity of citizenship, the right to trial by jury is a part of the remedy, just as it is in cases arising under the Jones Act and the Federal Employers Liability Act; since under *Byrd* v. *Blue Ridge Rural Electric Co-op, Inc.,* 356 U. S. 525, 538, 539, 2 L. Ed. 2d 953, 963, it was stated that in diversity cases, it is the Seventh Amendment that fashions the Federal policy favoring jury decisions of disputed fact questions.

The interest this Court manifests in preserving the right of trial by jury in diversity cases is thus exemplified in *Beacon Theatres* v. *Westover,* 359 U. S. 500, 501, 3 L. Ed. 2d 988, 992:

> "We granted certiorari, 356 U. S. 956, 2 L. Ed. 2d 1064, 78 S. Ct. 996, because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' Dimick v. Schiedt, 293 U. S. 474, 486, 79 L. Ed. 603, 611, 55 S. Ct. 296, 95 ALR 1150, 36 NCCA 184."

The importance of the question presented by Petitioner is also high lighted by the trend of lower Federal courts to deprive litigants of their rights of a jury determination in cases where jurisdiction is based on diversity of citizenship. Indicative of the trend in diversity cases have been the actions of the Circuit Court of Appeals for the Fifth Circuit in cases such as *Carolina Life Insurance Co.* v. *Williams,* 210 F. 2d 477; *Atlantic Coastline Railroad Co.* v. *Swafford,* 220 F. 2d 901; and *Phillips Petroleum Co.* v. *Gibson,*[5] 232 F. 2d 13. In each of these cases, this Court granted writ of certiorari and summarily reinstated the judgment of the District Court based on the jury verdict rendered, its action being reported respectively as follows: 348 U. S. 802, 99 L. Ed. 633; 350 U. S. 807, 100 L. Ed. 725; 352 U. S. 874, 1 L. Ed. 2d 77.

In 1964, the Court also reversed the case of *Theriot* v. *Mercer,* 262 F. 2d 754, 316 F. 2d 635, 377 U. S. 152, 12 L. Ed. 2d 206, by way of written opinion with instructions to enter judgment in accordance with the jury's verdict. These instances very likely could be multiplied, but those cited are illustrative of the tendency to substitute appellate findings for jury findings, to which this Court should bring a halt, as it did to a similar trend in F.E.L.A. cases.[6]

The refusal of the Court of Appeals to permit the jury to select which of several inferences as to the cause of the

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5. See Leon Green: Protection of Jury Trial in Diversity Cases Against State Invasions, 35 Tex. Law. Rev. 768.

6. *Rogers* v. *Missouri P. R. Co.*, 352 U. S. 500, 510, 1 L. Ed. 2d 493, 502, wherein it is said:

> "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

injury to Petitioner[7] it would credit is of a piece with the attitude of appellate courts in disposing of Federal Employers Liability Act cases prior to 1943. These efforts at curtailment of trial by jury were frustrated by the decisions of this Court decreeing that the very essence of the function of a jury is to select among conflicting inferences and conclusions, which requires a measure of speculation and conjecture on the jury's part in choosing what seems to it to be the most reasonable inference. Further, that there is a debatable quality about the very issue of negligence leaving fair minded men free to reach different conclusions thereon, which emphasizes the appropriateness of leaving the question to the jury. (*Tennant* v. *Peoria & Pekin Union R. Company*, 321 U. S. 29, 35, 88 L. Ed. 520, 523, 525; *Bailey* v. *Central Vermont Railway*, 319 U. S. 350, 353-354, 87 L. Ed. 1444, 1447; *Lavender* v. *Kurn*, 327 U. S. 645, 653, 90 L. Ed. 916, 923).

The effect of the Court of Appeals opinion is to deny to the jury the right of passing on the credibility of the witnesses, a privilege recognized in *Moore* v. *C. & O. Railway Company*, 340 U. S. 573, 576, 95 L. Ed. 547, 550, where there was only one witness to the transaction, and where the Court said: "it is the jury's function to credit or discredit all or part of the testimony".

The holding of the Court of Appeals also conflicts with the opinion entered by the same Court in *Travelers Insurance Company* v. *Rowand*, 197 F. 2d 283, 285, thus quoted:

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7. The Court speculated on what might have been, as follows:

> "The accelerator might have been held down by Mrs. Hudnall's foot. It might have stuck due to some external interference with normal action following the release of pressure applied by foot. It might have been due to negligence of General Motors in so designing or assembling the accelerator mechanism as to cause it to stick when pushed to the floor-board. There might have been some other cause for the motor racing and the wheels spinning." (Appendix A, p. A7, *infra*).

> "* * * but it was within the province of the jury, upon fair consideration, to believe or disbelieve all or any part of the evidence of this or any other witness where there was a conflict in the evidence or even if there was no conflict, where conflicting reasonable inferences might fairly be drawn from the undisputed facts."[8]

The evidence summarized on pages 3-9 hereof shows a sufficient basis for the jury's finding of causative negligence. It was convincing not only to the jury, but to the trial judge, who was intimately concerned with the trial, who had first hand knowledge of the applicable State principles hereafter set out, believed the case should go to the jury on both trials on the merits, and who overruled the motions for instructed verdict, for judgment notwithstanding the verdict, and for new trial (Vol. I, R. 506, 516, 527). See *Dick* v. *New York Life Insurance Company*, 359 U. S. 445-46, 3 L. Ed. 2d 935.

The disposition of this case by the Fifth Circuit Court of Appeals, if not corrected, will set a trend toward relieving automobile manufacturers of liability for mechanical and design defects at a time when loss of life and property through motor vehicle operation has reached an all time high. In 1965, traffic deaths in the United States increased to an estimated 49,000.[9] Disabling injuries were estimated at 1,800,000 for the same year, and less serious injuries totaling about the same number, with property damage accidents exceeding 11,000.000.[9]

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8. The Texas Rule is the same: *Ford* v. *Panhandle & Santa Fe Railway*, (S. Ct.) 252 S. W. 2d 561, 563, holding, "It was their (the jury's) province also to resolve conflicts and inconsistencies in the testimony of any one witness, as well as in the testimony of different witnesses (Citing cases)".

9. Hearings before a Sub-Committee on Executive Reorganization of the Committee on Government Operations, United States Senate, 89th Congress, second section; Traffic Safety: Examination and Review of Efficiency, Economy and Coordination of Public and Private Agencies' Activities for the Role of the Federal Government, Part 3, page 1105.

The Ignition Switch

The pronouncement of the Dallas Court of Civil Appeals that the manufacturer must exercise reasonable care in the manufacture of a chattel involving an unreasonable risk of causing harm to those whom the manufacturer should expect to be in the vicinity of its probable use was but a reiteration of the substantive law of Texas as pronounced in *Blickman, Inc.* v. *Chilton,* 114 S. W. 2d 646 and *Texas Bitulithic Co.* v. *Caterpillar Tractor Co.,* 357 S. W. 2d 406 (writ ref., n.r.e.).

The underlying principles of these cases were applied by the Texas Supreme Court as late as 1962 in *Strakos* v. *Gehring,* 360 S. W. 2d 787. In *Strakos,* the defendant contended that it was not responsible for a defect left in a highway because its work had been accepted and injury was caused by the negligence of another. The Court took occasion to say that:

> "As regards products liability for manufacturers and processors, the exceptions largely swallowed the rule. With Judge Cardozo's opinion in MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, L.R.A. 1916 F., 696, it became established that a manufacturer has an affirmative duty to those who may be reasonably expected to use his products or to be in the vicinity of such usage, and hence breach of this duty by the production of articles that are dangerous to human safety while being reasonably used, will establish tort liability. See annotation, 164 A.L.R. 569. (Id. 789).
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> * * *
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> ". . . the modern approach is to place contractors on the same footing as manufacturers of goods and apply the same general principles of negligence even after acceptance of the work. (Id. 792).
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> * * *

> " 'The cause must be decided on the facts, not by a legal fiction set up to bar a factual decision' (Id. 793).
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> * * *
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> ". . . the facts of this case present a situation of 'concurrent negligence' which operated to produce the injury. . . . In such a case, 'all persons whose acts contributed to the injury are liable therefor, and the negligence of one does not excuse the negligence of the other.' " (Id. 794).

The substantive law of Texas that ". . . the negligence of one does not excuse the negligence of the other" (*Strakos* v. *Gehring, supra,* page 794), is applicable in cases such as ours, even if the negligence of the other is intentionally tortious or criminal. In *Reeves* v. *Tittle,* 129 S. W. 2d 364, 367, er. ref., the court quoted and applied the rule of the Restatement of Torts, to-wit:

> " 'If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby.' "

The decision was cited with approval by Judge Norvell of the Texas Supreme Court when he was on the Court of Civil Appeals at San Antonio in *Kimbriel Produce Co.* v. *Mayo,* 180 S. W. 2d 504, 507, er. ref. w. m., and has received the sanction of the Texas Supreme Court in *City of Austin* v. *Schmedes,* 154 Tex. 416, 279 S. W. 2d 326, 331.

In the *Reeves* and *City of Austin* cases, *supra,* the defendants sought to avoid liability by reason of concurring acts of a third person in violation of the Penal Code, and it was held that the question was for the jury.

The Court of Appeals ignored the established substantive law of Texas, which holds that where a manufacturer

recognizes a hazard arising from the distribution of its products, but considers it so remote as to be outweighed by customer convenience (Vol. II, R. 965-966), the question of whether such conduct amounted to negligence is for a jury. Particularly is this true where the testimony shows further that the customer convenience was considered so slight as that it was not recognized by the automobile industry as a whole, but to the contrary, was made available on Chevrolets and Buicks alone (Vol. II, R. 648). This conception inevitably leads to the manufacturer being the sole arbiter of the care it need exercise. It may disregard that there may be temporary forgetfulness or negligence on the part of the operators of an automobile, despite the manufacturer's recognition of its design duty to make the product "idiot proof" (Vol. II, R. 930-931). The situation is aggravated when the testimony shows that the manufacturer could have avoided the injury by known and economic feasible means not destructive of the utility of the car and which had been in use by itself and all other American car manufacturers (*supra*, pages 8-9).

From the undisputed testimony of Mrs. Lane, Respondent's co-defendant, that she thought she had turned the motor off because she had the key in her hand, does not the jury have the right to reasonably conclude that, but for the negligent design of the switch in combination with an automatic transmission, the injuries would not have been sustained?

It has been judicially determined in Texas that an unattended car with the motor running exposes it to "... becoming a 'derelict' as it were, and the dangers attendant upon a vehicle being abandoned so as to become a menace to traffic or the public." *Rosner* v. *Harrell Drilling Co.*, 261 S. W. 2d 190, 193, error refused, n.r.e.

The holding of the Court of Appeals ordering judgment rendered for Respondent contrary to the jury verdict and the judgment of the trial court deprives Petitioners of the right of trial by jury, and is in conflict with the following federal and state court decisions, to-wit:

Rumford Chemical Works v. *Hygienic Chemical Co.*, 215 U. S. 156, 54 L. Ed. 137, 138, holding that where the record of a prior proceeding has not been put in evidence, ". . . the question here must be discussed, of course, on the evidence before the court below."

Compton v. *Elliott*, 126 Tex. 232, 88 S W. 2d 91, 95, holding that venue proceedings give rise to a dual trial ". . . once in the hearing of the plea of privilege and once in the trial of the merits, . . . and sometimes with inconsistent results." See also *Travelers Ins. Co.* v. *Employers Casualty Co.*, 380 S. W. 2d 610, reversing 370 S. W. 2d 105.

The cases holding that a presumption of identity of facts in two trials cannot be indulged, and the party claiming identity has the burden of so proving. *Harper* v. *Thompson*, 292 S. W. 263, 264; *Clem* v. *Fulghum*, 37 S. W. 2d 201, 204; *Yeager* v. *Dallas Coffin Co.*, 69 S. W. 2d 493, 494; *Angelina County Lumber Co.* v. *McKnight*, 265 S. W. 2d 246, 250.

The cases holding that absent an identity of facts produced on the trial on its merits with those produced on the trial on venue, the appeals decision did not constitute the law of the case. 4 Tex. Jur. 2d, Appeal & Error, Civil, #1011, page 701 and cases there cited.

The jury verdict that the switch was negligently designed was set aside by the Court of Appeals by the application of principles that turned on the sufficiency of the

evidence in the state interlocutory proceeding. In effect. this was the application by the Court of Appeals of a State standard to determine the sufficiency of the evidence. rather than the Federal standard. The question of which should apply, if not having been determined in favor of the Federal rule, was expressly left open for determination by this Court in *Dick* v. *New York Life Insurance Co.*, 359 U. S. 437, 445, 79 S. Ct. 921, 3 L. Ed. 2d 935; and *Mercer* v. *Theriot*, 377 U. S. 152, 156, 84 S. Ct. 1157, 12 L. Ed. 2d 206, 210. In setting aside the jury verdict that the Defendant negligently designed and assembled the accelerator linkage, the Court of Appeals held that it was not bound by the opinion of the Dallas Court to the effect that a fact issue was raised. This was done through the expedient of holding that the testimony of Mrs. Hudnall was of no probative value, because given without objection in answer to a leading question.

In both instances the right of trial by jury was precluded by standards foreign to both Federal and State proceedings. One can hardly imagine a clearer example of "judicial erosion" of the "essential guarantee of the Seventh Amendment" described by Mr. Justice Black in his dissent in *Galloway* v. *United States*, 319 U. S. 372, with whom Justice Douglas and Justice Murphy concurred.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted, and it is submitted that the case is a proper one in which to summarily order the vacation of the judgment of the Circuit Court of Appeals and the reinstatement of the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Franklin Jones, attorney for Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served a copy of the foregoing Application for Writ of Certiorari on Mr. Leon Jaworski, counsel for Respondent, by mailing the same, first class, postage prepaid, addressed to his office at the Bank of the Southwest Building, Houston, Texas, dated this the ..... day of December, 1966.

.....

APPENDIX A

Opinion of Circuit Court of Appeals

(Caption Omitted)

Before TUTTLE, Chief Judge, JONES and WATERMAN,* Circuit Judges.

JONES, Circuit Judge: C. L. Lane and Alice Lane, his wife, on August 27, 1960, purchased a new Chevrolet automobile, manufactured by the appellant, General Motors Corporation, from the Smith Chevrolet Company of Henderson, Texas. On September 15, 1960, after the car had been driven five or six hundred miles at moderate speeds, Mrs. Lane drove the car to Duncan's Five and Ten Cent Store on the Main Street of Kilgore, Texas and diagonally parked against a curb about eight inches in height. On the front seat with Mrs. Lane was her mother, Nellie Hudnall. On the rear seat was a five-year old son of the Lanes. Mrs. Lane left the car and got her son from the rear seat. She had parked close to a truck on the right and suggested to her mother that she slide under the wheel and get out on the driver's side.

The ignition switch was of a design which had been used on Chevrolets since 1948 and was in use on General Motors' Buick cars. It had four positions: "Lock," "off," "on" and "start." The key could be removed from the "on" position with the motor running. If so removed, the switch could be turned on and off without the use of the key. The key could be removed from the "lock" position and the ignition would be cut off.

*Of the Second Circuit, sitting by designation.

In leaving the car Mrs. Lane had removed the key and left the ignition switch in the "on" position, with the car in drive gear, with the motor running and, apparently, without setting the brakes. As Mrs. Hudnall was leaving the car on the driver's side, the engine suddenly accelerated, the wheels spun, and the car jumped the curb and on to the sidewalk. The appellee, Barbara June Muncy, was on the sidewalk. The Lane car, with the motor racing, struck Mrs. Muncy and pushed her through a glass store window. Someone reached through the car window and cut off the ignition. Mrs. Muncy, joined by her husband, brought suit in the District Court of Dallas County, Texas, to recover for the severe injuries she had sustained, naming as defendants C. L. Lane, his wife Alice Lane, her mother Nellie Hudnall, Davis Smith, doing business as Smith Chevrolet Company, and General Motors Corporation. Each of the defendants, except General Motors, resided in Rusk County, Texas, and they filed pleas of privilege seeking to transfer the venue to Rusk County. The court sustained the pleas and in so doing held that no bona fide cause of action had been established against General Motors. The decision of the District Court of Dallas County was affirmed by the Texas Court of Civil Appeals. *Muncy v. General Motors Corporation*, 357 S. W. 2d 430. An application was made by the Muncys to the Supreme Court of Texas for a writ of error but, before a ruling was made they dismissed their application and took a voluntary non-suit in the state district court. The Muncys then filed suit in the United States District Court for the Eastern District of Texas against the same defendants as had been sued in the state court. One trial resulted in a mistrial. On a second trial the Muncys recovered a judgment for $225,000 against the Lanes, Mrs. Hudnall and General Motors. Only General Motors has appealed.

Mr. and Mrs. Muncy sought recovery against the appellant, General Motors Corporation, upon two theories. The first theory is that General Motors negligently designed the ignition switch used on the Lane automobile in a manner permitting the ignition switch key to be withdrawn with the motor running and that such negligent action was a proximate cause of the injuries sustained by Mrs. Muncy. The other theory is that General Motors negligently designed and assembled the Lane automobile in such manner that the accelerator would hang or stick when the motor was running and the car was in gear so as to cause the wheels of the car to revolve rapidly although no direct pressure was being applied to the accelerator by any human agency, and that such negligent action was a proximate cause of Mrs. Muncy's injuries.

The first of these contentions was considered and fully discussed by the Court of Civil Appeals of Texas in its opinion. Although the decision of the Texas court is not in any sense res judicata, it is the considered conclusion of this Court that the Texas court has clearly and correctly set forth the principles which control the issue presented by the claim of a defective design of the ignition switch. It follows that under the law of Texas the appellees cannot recover from General Motors upon their first theory. The Federal courts are bound by the law of Texas on this question. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. Two recent decisions[1] of other courts of appeal are in accord with the position to which we adhere.

In the district court and before this Court, the primary thrust of the Muncys' contention against General Motors is predicated upon their claim of a defective design of the

1. Evans v. General Motors Corporation, 7th Cir. 1966, 359 F.2d 822; Gossett v. Chrysler Corporation, 6th Cir. 1966, 359 F.2d 84.

ignition switch. It was also asserted before the district court, and it is here asserted that General Motors negligently designed and assembled the accelerator system of the Lane automobile and that its negligent action was a proximate cause of Mrs. Muncy's injuries.

There was evidence that an accelerator mechanism could be manufactured defectively and in such a manner that it would stick, and that a car with such a defective accelerator might have been delivered to a consumer purchaser. There was no positive evidence that the accelerator on the Lane car was defective. It gave no trouble before the accident. It gave no trouble after the accident. If any inspection was made of the accelerator equipment after the accident, it is not shown by the record before this Court.[2] There was evidence that sometime before the accident the engine of the Lane Chevrolet had idled high and that this was corrected by a carburetor adjustment. There was evidence that some brake repair or adjustment was made. There was no evidence that the carburetor or brake had anything to do with the accident in which Mrs. Muncy was injured or that would permit the jury to draw such an inference.

Mrs. Lane did not see her mother during the time the motor speeded and the car moved. Mrs. Hudnall was shocked. She could not remember how she moved from the right side of the car toward the left side of the car. She could not remember how far she had moved before the motor began racing. She could not remember what position she was in or what movement she had made. She said she did not know whether she got out on the driver's

2. This appeal is to be decided without consideration of the testimony before the state court of a mechanic "that he tested the accelerator linkage after the accident and inspected the accelerator and found nothing wrong." 357 S. W. 2d 430, 436.

side or the passenger's side. She knew nothing about how the motor was stopped. She did not know whether her foot struck the accelerator or not. She did not have any idea as to why the car jumped forward and didn't know whether the motor was running or not. She didn't think she froze on the accelerator pedal. She was asked if she remembered that she didn't have any conscious knowledge of getting on a pedal and holding it down, and in reply she said that if she did she didn't know it. In response to a general question as to her activities from the time her daughter got out of the car until it lurched forward, Mrs. Hudnall stated that she didn't recall anything she did at the time and she did not know where her feet were. Later, and after testifying that she didn't know the accelerator from the brakes, Mrs. Hudnall was asked, "Then you know you didn't have your foot on anything there holding it down, don't you?" Although she had twice denied having any recollection of the circumstances, she was led into giving an "I did not" answer to the question. The testimony of other witnesses shed no light upon whether or not Mrs. Hudnall kept her foot on the accelerator.

This is a diversity case and the law of Texas will provide the principles for determining liability. In the Texas case of *Muncy* v. *General Motors Corporation, supra,* the court accepted the Restatement rule as follows:

> A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured. Restatement, Torts § 395. 357 S. W. 2d 430, 435. See *Ford Motor Co.* v. *Mathis*, 5th Cir. 1963, 322 F. 2d 267.